No. 18

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

THE FIRST NATIONAL BANK OF CLARION, PENN., Plaintiff in Error, v. GEORGE D. HAMOR, Defendant in Error.	*Error to the Circuit Court, of the United States District of Washington, Western Division.*

Brief of Plaintiff in Error.

W. C. SHARPSTEIN,

Attorney for Plaintiff in Error.

Filed this 28 day of December, A. D., 1891.

.....*Clerk.*

DEMPSTER BROS PRINTERS BOND & GLEN PARK AVE

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THE FIRST NATIONAL BANK OF CLARION, PENN.,
Plaintiff in Error,

v.

GEORGE D. HAMOR,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Abstract of the Case.

This is an action at law commenced by plaintiff in error to recover $6,374.45, with interest, from the defendant. The amount claimed is the sum due on three judgments rendered in the County Court of Common Pleas of Clarion, Pennsylvania,

in favor of plaintiff in error and against the defendant in error, and one E. Kuntz.

The original causes of action were three promissory notes, made by one H. Loeb, in favor of the defendant in error and one E. Kuntz, and by them transferred to plaintiff in error, with a guaranty of payment and warrant to any attorney of any Court of record to confess judgment against them in default of payment at maturity.

The defendant in error answered denying any indebtedness by reason of the judgments; denied any knowledge or information sufficient to form a belief as to the rendition of the judgments, and as new matter alleged his absence from the State of Pennsylvania at the time the judgments were rendered; that he had never been served with process; had never appeared or authorized anyone to appear for him, and particularly denied that the attorney who had appeared had any authority to appear for him.

A reply was filed putting in issue the new matter contained in the answer. Upon these pleadings the cause went to trial. Plaintiff, subject to objections raised by counsel for defendant, introduced three judgments in favor of itself against the defendant in error and one E. Kuntz, and three several warrants of attorney to confess judgment executed by said parties, and rested.

The defendant offered proof in support of his

new matter, but this was excluded. The cause was submitted, and thereafter the Court filed its opinion, reading in favor of defendant. The particular part of the opinion excepted to by plaintiff in error, is that part finding a variance to exist between plaintiff's pleading and proof. In substance the Court held that the judgments were jointly against defendant in error in E. Kuntz; that as judgments against defendant in error alone had been alleged, there was variance. Judgment was entered in favor of defendant in error. A motion for new trial was made and denied. Subsequently a writ of error was sued out by plaintiff in error.

Assignment of Errors.

1st. The Court erred in rendering judgment in favor of the defendant, George D. Hamor, and against the plaintiff, First National Bank of Clarion, Pennsylvania, whereas the judgment in said cause should have been rendered in favor of the plaintiff and against the defendant.

2nd. The Court erred in rendering judgment in favor of the defendant, George D. Hamor, on the first cause of action set out in plaintiff's complaint, whereas judgment should have been ren-

dered in favor of the plaintiff and against said defendant.

3d. The Court erred in rendering judgment in favor of the defendant, George D. Hamor, on the second cause of action set out in plaintiff's complaint, whereas judgment should have been rendered thereon in favor of the plaintiff and against said defendant.

4th. The Court erred in rendering judgment in favor of the defendant, George D. Hamor, on the third cause of action set out in plaintiff's complaint, whereas judgment should have been rendered thereon in favor of the plaintiff and against said defendant.

5th. The Court erred in denying plaintiff's motion to compel the said defendant to assume the burden of proof in said cause.

6th. The Court erred in excluding from the evidence the certified copy of the record and proceedings and judgment in the Court of Common Pleas in and for the County of Clarion, in the Commonwealth of Pennsylvania, in a cause entitled: First National Bank of Clarion, Pennsylvania, *v.* George D. Hamor and E. Kuntz, containing a record of judgment against the said defendant, George D. Hamor, dated August 13,

1888, for the sum of two thousand, ten and 50-100 dollars, together with interest and costs; offered by this plaintiff on the trial of said cause and marked Exhibit "A."

7th. The Court erred in excluding from the evidence the certified copy of the record of proceedings and judgment in the Court of Common Pleas in and for the County of Clarion, in the Commonwealth of Pennsylvania, in a cause entitled: First National Bank of Clarion, Pennsylvania, *v.* George D. Hamor and E. Kuntz, containing a record of judgment against the said defendant, George D. Hamor, dated October 13, 1888, for the sum of twenty-one hundred dollars, together with interest and costs; offered by this plaintiff on the trial of said cause, and marked Exhibit "B."

8th. The Court erred in excluding from the evidence the certified copy of the record of proceedings and judgment in the Court of Common Pleas in and for the County of Clarion, in the Commonwealth of Pennsylvania, in a cause entitled: First National Bank of Clarion, Pennsylvania, *v.* George D. Hamor and E. Kuntz, containing a record of judgment against the said defendant, George D. Hamor, dated November 12, 1888, for the sum of twenty-one hundred dollars, together with interest and costs; offered by

this plaintiff on the trial of said cause, and marked Exhibit "C."

9th, 10th, 11th, 12th, 13th and 14th assignments omitted.

15th. The Court erred in finding that the plaintiff did not on the 13th day of August, 1888, or any time, or at all, in the County Court of Common Pleas of Clarion County, obtain a judgment against the defendant, George D. Hamor, as alleged in the first cause of action, set forth in plaintiff's complaint.

16th. The Court erred in finding that the plaintiff did not at any time recover a judgment against the defendant, George D. Hamor, as alleged in the second cause of action in plaintiff's complaint.

17th. The Court erred in finding that the plaintiff did not on the —— day of January, 1885, or at any time, obtain a judgment against the defendant, George D. Hamor, as alleged in the third cause of action.

18th. The Court erred in finding as a conclusion of law that there is a total failure of proof on the part of the plaintiff, and that the defendant is entitled to judgment herein, for his costs.

19th. The Court erred in denying plaintiff's motion for a new trial.

BRIEF OF POINTS AND AUTHORITIES.

The first error complained of is that the Court denied plaintiff's motion to compel defendant to assume the burden of proof. Judgments were alleged to have been rendered against the defendant. Transcripts of judgments certified as required by the Revised Statutes were annexed to the complaint and referred to.

The Statute of Washington, Code of Procedure, Section 194, provides:

"The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, *or of any knowledge or information sufficient to form a belief.*"

Defendant's denial of the rendition of the several judgments was of the character italicized.

We contend that no issue was raised by such a denial. The defendant certainly had information of the rendition of the several judgments, for they were exhibited to him. We cite no authorities, for we have been unable to find any in point, either for or against our contention. The principle is well settled, however, in favor of our contention.

The motion and ruling of the Court are found in the printed record.

Bill of Exceptions, pp. 51, 52.
Opinion, pp. 16, 17.

The second error complained of, and the one on which we chiefly rely for a reversal, is found in the sixth, seventh and eighth assignments of error. The objections and ruling of the Court are found in the printed record.

Opinion, pp. 17, 18.
Bill of Exceptions, 52, 53.

On the trial certified transcripts of judgments recovered by plaintiff in error against defendant in error and one E. Kuntz were offered and admitted subject to defendant's objection, and the Court took the objection under advisement with the case. The objections urged were as follows:

"That the same is incompetent, irrelevant and immaterial in this, that each of said pretended judgments was a joint judgment against the defendant, George D. Hamor and one E. Kuntz, and that this action is brought against the defendant George H. Hamor, alone."

The other objection goes to a question of jurisdiction, but as the Court below determined this objection in our favor we will not quote it.

The Court, in its opinion, determined the first

objection adversely to plaintiff, and this ruling is assigned as error.

The objection was in effect one of defect of parties, and defendant in error had waived his right to make this objection. The following are the Code of Procedure provisions:

Section 189: "The defendant may demur to the complaint when it shall appear upon the face thereof either * * *

"4. That there is a defect of parties plaintiff or defendant."

The defect did not appear on the face of the complaint.

Section 191: "When any of the matters enumerated in Section 189 do not appear upon the face of the complaint, the objection may be taken by answer."

These two provisions are a substitute for the common law plea in abatement.

Section 193: "If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the Court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the Superior or Supreme Courts."

The answer, as we have shown, contained no

plea of non-joinder. Under the Code defendant had barred himself of his right to object to the non-joinder of his co-judgment debtor.

The Court below interpreted defendant's objection as directed to a variance between the allegations of the complaint and the proof.

That there was no variance we cite:

Cocks *v.* Brewer, 11 M. & W., 51,
Gilman *v.* Rives, 10 Peters, 298;
Burgess *v.* Abbott, 6 Hill, 135;
Carter *v.* Hope, 10 Barb., 180;
Lee *v.* Wilkes, 27 How. Pr., 336;
Waits *v.* McClure, 10 Bush, 763;
Bowden *v.* Winsmith, 11 S. C., 409;
Pavisich *v.* Bean, 48 Cal., 364.

Looking at the question in its worst feature, however, it was but a variance, and under Code of Procedure, Section 217: "No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled and thereupon the Court may order the pleading to be amended upon such terms as shall be just."

No such allegation was made. The objection

does not even suggest a variance. Under the ruling of the Supreme Court of Washington the ruling of the Court below was error.

Carson *v.* Railsback, 3 Wash. Ty., 168.

As the other errors assigned are subsequent to those just argued and result from them, no further statement of them need be made.

Respectfully submitted,

W. C. Sharpstein,

Attorney for Plaintiff in Error.

United States Circuit Court of Appeals, Ninth Circuit.

THE FIRST NATIONAL BANK OF CLARION, PENNSYLVANIA,
vs.
GEORGE D. HAMOR.

No. 18.
Filed January 25, 1892.

Before JUDGES DEADY, HAWLEY and MORROW.

Mr. W. C. Sharpstein, for the Plaintiff in Error,

No counsel appearing for the Defendant in Error.

Error to the Circuit Court, for the District of Washington.

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(1). DEFECT OF PARTIES—PLEA IN ABATEMENT.—The non-joinder of a co-debtor in a contract or judgment, can only be taken advantage of, where such omission does not appear on the face of the complaint, by a plea in abatement, and a defendant who fails to so plead, is deemed to have waived the objection.

DEADY, J., delivered the opinion of the Court.

The plaintiff in error brought an action at law against the defendant in error, on three several judgments, given on warrants of attorney, in Clarion County, State of Pennsylvania, against the defendant and one E. Kuntz, for the sum, in the aggregate of $6,374.45, with interest from dates in 1888, at the rate of six per centum.

The action was brought against Hamor alone, and the complaint states that the judgments were given against him, without mention of Kuntz.

The defendant answered denying knowledge or information of the matter alleged sufficient to form a belief; and also made a defense, to the effect, that he was not a resident of the State of Pennsylvania at the date of the judgments, but of Washington; and that no process was ever served on him in the actions in which said judgments were given, nor did he appear therein; and that the appearance of any attorney for him, was unauthorized.

The defense was contradicted by a reply; and the case was tried by the Court without a jury.

To support his case the plaintiff offered in evidence duly certified

transcripts of the several judgments sued on, from which it appeared that they were given against Kuntz, as well as the defendant.

Objection was made to their admission on the ground of variance, between them and the complaint, because of the non-joinder of Kuntz. The objection was sustained and the defendant had judgment.

Various other rulings and proceedings appear in the record which have nothing to do with the merits of the case or are not viewable here. For instance there was a motion for a new trial which was denied. Now the granting or denying a motion for a new trial, rests in the National Courts, as at common law, in the discretion of the judge.

But it is clear that the learned judge of the Court below erred in refusing to admit the transcripts in evidence, on the ground of variance. They were undoubtedly admissible in support of the complaint and fully proved the plaintiff's case.

It was long since settled at common law that one of several joint debtors on a contract or judgment, may be sued alone, as upon a sole indebtedness, and unless the non-joinder of his co-debtor is taken advantage of by a plea in abatement, it is waived.

Cocks vs. Brewer, 11 Mes. & Wels., 51; Carter vs. Hope, 10 Barb., 180; 1 Chit. Plead., 48.

The codes of modern procedure have given this rule the force of statute. That of Washington provides, Section 189; "The defendant may demur to the complaint when it shall appear upon the face thereof, either * * *

4. That there is a defect of parties plaintiff or defendant."

This defect, the non-joinder of Kuntz, did not appear on the face of the complaint, and the case is provided for in Section 191, which reads: "When any of the matters mentioned in Section 180, do not appear upon the face of the complaint, the objection may be taken by answer."

This answer is a substitute for the common law plea in abatement, and only differs from it in name.

Section 193 provides: "If no objection be taken by either demurrer or answer, the defendant shall be deemed to have waived the same, excepting" etc., not including defects of parties. Lee vs. Wilkes, 27 How. Pr., 336; 48 Cal., 364.

The judgment is reversed and the case is remanded for a new trial.